

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KISSTON R HILLYER
Claimant

ALANIZ LLC
Employer

APPEAL 15A-UI-14286-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/05/15
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant, Kisston R. Hillyer, filed an appeal from the December 16, 2015, (reference 03) unemployment insurance decision that denied benefits based upon excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on January 19, 2016. The claimant participated. The employer, Alaniz LLC, participated through HR Coordinator Jordan Dziulko. Employer's Exhibit A was admitted.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production coordinator from July 13, 2015, until this employment ended on November 23, 2015, when she was discharged.

Claimant and another production coordinator had an altercation with an employee on Wednesday, November 18, 2015. Claimant said she was leaving and then went home. She received a written warning for this action. (Exhibit A, page 11) She contacted supervisor Ryan Ball the following day, November 19, at 11:30 a.m. – more than five hours past her normal start time – to inform him that she would not be at work that day. She received a final written warning for this improperly reported absence. (Exhibit A, page 11)

Claimant did not go to work on Friday or Sunday because she did not know she was scheduled for these days. Both parties testified that overtime is scheduled one day before it is to occur. If an employee is not working the day before the overtime shift, someone from the employer calls her to notify her she needs to be at work the following day. The employer testified that Ball

would have been the person to notify claimant that she was scheduled for overtime on Friday and Sunday. Claimant denies she received a telephone call.

Claimant reported to work on Monday, November 23. Ball terminated her that day. He informed her that she was being discharged because of the way she departed the previous Wednesday and her failure to come to work on Thursday, Friday, and Sunday. Claimant's disciplinary report regarding her written and final written warnings also indicates she was terminated. (Exhibit A, page 11) It does not provide any additional information about the end of her employment.

Employer maintains a policy that any employee who fails to come to work and fails to call 30 minutes prior to the start of his or her shift on three consecutive days is deemed to have voluntarily resigned. (Exhibit A, page 4)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

While the employer claims that claimant failed to call or come to work for three consecutive days, its own documentation indicates that claimant was terminated rather than deemed to have resigned. This claim will be analyzed as a discharge rather than a voluntary quit.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. Excessive unexcused absenteeism is an **intentional disregard** of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n.1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant the more credible witness. Claimant would not have known she was scheduled to work a specific day or days for overtime until the day before. Since she was not at work on Thursday or Saturday, Ball should have called to notify her that she was scheduled for overtime on Friday and on Sunday. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Ball remains employed by the employer, and the employer did not offer an explanation for his absence from the hearing. Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, the administrative law judge concludes that the employer has not met its burden of proof. It is permissible to infer that Ball did not participate in the hearing because his testimony would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant's last absence was caused by Ball failing to notify her that she was scheduled to work. Without Ball contacting her, claimant had no way of knowing she was expected to be working on Sunday, and missing her Sunday shift could not have been intentional. Because she did not intentionally fail to report to work on Sunday, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Benefits are allowed.

DECISION:

The December 16, 2015, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/css